

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: **December 18, 2000**

Case No.: **1999-INA-269**

CO No.: **P1996-CA-09052372/AT**

In the Matter of:

LITTLE CAESAR'S PIZZA # 749,
Employer,

on behalf of

CAMILO PEREZ-RANGEL,
Alien

Certifying Officer: Pandora Wong, Region IX
San Francisco, California

Appearance: Jean-Pierre Karnos, Esq.
Santa Ana, California
for Employer and Alien.

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN M. VITTON
Chief Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that Little Ceasar's Pizza # 749 ("Employer") filed on behalf of Camilo Perez-rangel ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California,, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

On December 11, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Cook Italian Food" in its Restaurant. The position was classified as an

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

"Cook, Specialty, Foreign Food, under Occupational Code No. 313.361-030.² The Employer described the Job Duties as follows:

The applicant must be a Speciality Cook in Italian dishes. Applicant must be able to season and prepare a wide variety of Italian speciality dishes including ravioli, antipasto, Italian style Caesars sandwiches, and a variety of pizzas. The applicant must prepare fresh daily marinara sauce for spaghetti and other types of pastas. The applicant will be required to use a wide variety of kitchen equipment and specialized utensils in addition to measuring and mixing various ingredients according to prescribed Italian recipes.

AF 18, box 13. (Copied verbatim without change or correction.). Employer's educational requirement was completion of grade school, and it further required two years of work experience in the Job Offered. The Employer's recruitment report noted six applicants for this position, none of whom was hired for the Job Offered. AF 27-29.³

On July 8, 1997, the Certifying Officer ("CO") remanded the application to the California Employment Development Department ("EDD"). (AF 16-17). The CO determined that the position was mis-classified, and that the position should have been classified as a Cook, Specialty, with an experience requirement of one year or less. EDD was instructed to "determine whether the job is actually for specialty cook or foreign specialty cook and an appropriate wage ... depending on the occupational title." (AF 17). The record contains no information regarding the disposition of this remand.

Subsequently on October 20, 1998, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 13-15). The NOF cited 20 CFR §§ 656.21(b)(6), 656.21(j)(1)(iii) and (iv), and said the Employer rejected Mr. Sasso for reasons that were not lawful or job-related, even though he was apparently qualified for the position offered. Employer submitted a rebuttal that consisted of a letter from counsel, which the Employer's manager countersigned, denying that Mr. Sasso was qualified, able, available, and willing to fill the Job Offered. The reason it gave for rejecting Mr. Sasso was that "his over experience is what disqualifies him for the employer's need and position. It is quite probable that Mr. Sasso decided against interviewing for the position because he would be leaving an exquisite atmosphere to a more causal one." (AF 8,25, 27).

The CO issued a Final Determination denying certification on March 9, 1999. (AF 4-6). After reviewing the NOF findings concerning Employer's rejection of Mr. Sasso, and the Employer's rebuttal, the CO stated, "his prior or present employment is viewed as a deterrent by the employer to accepting the job vacancy, but there is no evidence that Mr. Sasso himself feels that acceptance of the job vacancy would be demeaning or of a lesser status than his current or prior employment." (AF 5). On

²313.361-030 **COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)** Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77*

³ A national of Mexico, the Alien was born in 1955 and completed grade school in 1969. From June 1972 to December 1976 the Alien worked as cook in a "rotisserie" in Mexico, where his duties were the same as the Job Offered. From February 1989 to the date of application the Alien worked in the Job Offered as a Cook Italian Specialty. At the time of application the Alien was living and working in the United States without a visa.

March 18, 1999, the Employer requested administrative judicial review of the denial of certification.

Discussion

At issue in this case is whether Employer successfully rebutted the NOF as to Mr. Sasso by its assertion that he was unwilling to accept the interview, without independent documentation. The Board has held that "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." *Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). The assertion by Employer fits these criteria. Furthermore, the facts of this case lend to its credibility. It is highly likely that a chef with "16 years of experience preparing fine Italian foods at what appears to be an exquisite restaurant" would decline an interview with a Little Caesar's Pizza Station. (AF 7). We find that this statement successfully rebutted the NOF in regards to Mr. Sasso.

In reviewing the case file, however, there remains the question of proper classification of the job, as raised in the remand to the EDD. The information submitted with the file is unclear as to whether the remand was concurrent with the consideration and issuance of the NOF, or whether the remand was resolved prior to such issuance. Absent information as to the conclusion of this remand, the Board cannot determine at this time whether certification should be granted. Accordingly, the following order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and the matter is **REMANDED** for consideration consistent with this decision.

For the panel:

JOHN M. VITTON
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages.

Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.